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DECISION



Zimmer

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

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FILE: B-207592

DATE: June 23, 1982

MATTER OF: Lieutenant Weldon E. Maki, Retired (Deceased)

DIGEST: A Navy lieutenant remarried even though a final decree was not entered in a divorce action from his first wife. Following his death, both wives claimed to be his widow for purposes of entitlement to a Survivor Benefit Plan annuity. Because of the unusual facts involved in the case, it is not clear which claimant would be considered the widow under applicable state law. In the absence of a determination of the matter by a court of competent jurisdiction, no payments may be made to either party.

The Disbursing Officer, Navy Finance Center, Cleveland, Ohio, requests a decision as to who is the legal widow of Lieutenant Weldon E. Maki, USN, Retired (Deceased), for purposes of entitlement to a Survivor Benefit Plan annuity under 10 U.S.C. §§ 1447-1455. According to statute the widow of the deceased is to receive the annuity. However, Lieutenant Maki was married twice and both wives claim to be his legal widow. We conclude that the validity of Lieutenant Maki's divorce and remarriage is so uncertain that we cannot determine who the legal widow is, and consequently cannot authorize the payment of benefits to either of the claimants. The proper course is for the parties to obtain a determination of their marital status by a court of competent jurisdiction.

This case was forwarded to us by the Navy Accounting and Finance Center and has been assigned submission number DO-N-1394 by the Department of Defense Military Pay and Allowance Committee.

According to the record, Lieutenant Maki married Sarah Fay Maki on March 19, 1949, in Yuma, Arizona. The two separated in 1965, at which time Sarah apparently filed for divorce in San Diego County, California. Sarah obtained an interlocutory decree in September 1965, and apparently indicated to Lieutenant Maki that she would also obtain the final decree of divorce. While reportedly the records of the Superior Court of San Diego County fail to show that a final decree was ever entered, it appears that until Lieutenant Maki's death all parties acted as though it had been entered. Lieutenant Maki

subsequently married Jane Mary Paige on October 21, 1968, in California, and apparently they considered themselves married until Lieutenant Maki's death on December 2, 1981.

Following Lieutenant Maki's death, both Jane and Sarah submitted claims for the Survivor Benefit Plan annuity. Under 10 U.S.C. § 1450(a) the annuity is to be paid to the eligible "widow" which is defined by 10 U.S.C. § 1447 as the "surviving wife." Although it is undisputed that the annuity is available to be paid and that Lieutenant Maki's legal widow is entitled to it, it is not clear which of the two is his legal widow.

According to California law, which applies here, a marriage can be ended one of three ways--death of a party, a judgment of dissolution (divorce), or a judgment of nullity. Cal. Civ. Code § 4350 (Deering 1972). None of these occurred in Lieutenant Maki's marriage to Sarah prior to his subsequent marriage to Jane. While an interlocutory divorce decree was obtained, only a final decree would have restored Lieutenant Maki to the status of a single person and permitted him to remarry. See Cal. Civ. Code § 4514 and 39 Comp. Gen. 374 (1959). Therefore, the subsequent marriage to Jane appears to be void. Cal. Civ. Code § 4401. However, in this case it is not clear why the final divorce decree was not entered, although Sarah reportedly advised Lieutenant Maki that she would obtain it and all three parties appear to have acted as though it had been obtained, until Lieutenant Maki's death. In cases in which the parties are entitled to a final decree, but by "mistake, negligence or inadvertence" it is not entered, California law allows a decree of final judgment to be entered nunc pro tunc so as to validate a second marriage. Cal. Civ. Code, § 4515. It has been held that even the putative wife can move for a nunc pro tunc judgment after the death of her husband in such a case. Coefield v. Coefield, 92 Cal. App. 3d 959, 155 Cal. Rptr. 355 (1979). In addition, California courts have held that in some circumstances a party who participates in a divorce and later acts in reliance upon it, may be estopped from challenging the other party's subsequent remarriage on the basis that the divorce was invalid. See Spellens v. Spellens, 317 P. 2d 613 (Sup. Ct. Cal. 1957).

The central issue in this case--determination of the legal widow--is a matter of California law. In view of the unusual facts in this case we are unable to determine with reasonable certainty which claimant would be considered the legal widow under California law. In such a case in the absence of the

B-207592

determination by a court of competent jurisdiction as to whether the remarriage was valid, a claim for Survivor Benefit Plan payments cannot be allowed. See Matter of Paradise, B-204367, April 6, 1982. Therefore, until it is determined whether Jane or Sarah is the legal widow, we may not allow payment of the annuity to either.

for Milton J. Aorstar
Comptroller General
of the United States